STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2012
v	No. 303385 Jackson Circuit Court
DAVID LEE SWANIGAN, Defendant-Appellant.	LC No. 10-005672-FH

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

David Lee Swanigan appeals as of right his jury trial conviction of second offense possession with the intent to deliver less than 50 grams of cocaine.[1] Swanigan was sentenced as a fourth habitual offender[2] to 46 to 240 months' imprisonment. We affirm.

On August 29, 2010, Officer Kyle Ruge of the City of Jackson Police Department stopped an automobile driven by Swanigan for improper lane use. In response to Ruge's questioning, Swanigan was unable to provide an exact address for where he came from or where he was going. Swanigan, who was not from the area, was driving a rental car. Because Swanigan was unable to provide the addresses, was from out-of-town, and was driving a rental car from out of the county, Ruge called the department's canine unit to assist him as backup. Ruge testified that each of the previously listed factors could be indications of drug activity.

Officer Steven Scarpino, who handled the canine unit, arrived approximately 12 to 15 minutes after Ruge initiated the traffic stop. After making three passes around Swanigan's car, the canine signaled the presence of drugs in the trunk of the vehicle. Scarpino and Ruge searched Swanigan's car and found four bags that contained a white powdery substance. Subsequent testing revealed that one of the bags contained two "chunks" of powder cocaine. The remaining three bags were not tested by the Michigan State Police laboratory, nor were they

[1] MCL 333.7401(2)(a)(iv); MCL 333.7413(2).

[2] MCL 769.12.

field-tested.[3] Two of the untested bags contained a substance that Ruge and Scarpino identified as crack cocaine, while a third contained an individually packaged substance that they identified as powder cocaine.

Swanigan argues that his conviction for possession of cocaine with the intent to deliver must be reversed as the drug evidence was seized in violation of his Fourth Amendment right against unreasonable searches and seizures. We disagree. This issue was raised in the trial court in a pretrial motion to suppress the evidence. "To the extent a trial court's decision regarding a motion to suppress is based on an interpretation of the law, appellate review is de novo."[4] A trial court's findings of fact "made in conjunction with a motion to suppress are reviewed for clear error."[5]

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures.[6] If evidence is unlawfully seized in violation of this right, it must be excluded from trial.[7] While a routine traffic stop by police officers is a seizure, the traffic stop does not violate a defendant's constitutional protections if it is not unreasonable under the circumstances.[8] A traffic stop made without a warrant does not violate the Fourth Amendment if a police officer has probable cause to believe that a traffic violation or civil infraction has occurred.[9] During a routine traffic stop, police officers may question a vehicle's driver and occupants and may use canines used in drug detection to sniff the vehicle.[10] In *Caballes*, the United States Supreme Court upheld a canine sniff during a traffic stop because such a sniff did not implicate legitimate privacy interests, and because it found that the "duration of the stop . . . was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."[11] Thus, in order to comply with the Fourth Amendment, an officer who orders a

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[3] Stephanie Tomasic, a forensic scientist with the Michigan State Police, testified that the remaining bags were not tested because the combined weight of the substances found in all four bags was less than 50 grams. The statutory penalty for possession of cocaine with the intent to deliver does not vary when the amount of drugs possessed is less than 50 grams. MCL 333.7401(2)(iv).

[4] *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

[5] *Id.*

[6] US Const, Am IV; Const 1963, art 1, § 11.

[7] *Terry v Ohio*, 392 US 1, 12; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[8] *Whren v United States*, 517 US 806, 809-810; 116 S Ct 1769; 135 L Ed 2d 89 (1996).

[9] *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

[10] *People v Williams*, 472 Mich 308, 318 n 16; 696 NW2d 636 (2005); *People v Jones*, 279 Mich App 86, 91, 94-95; 755 NW2d 224 (2008); *Illinois v Caballes*, 543 US 405, 407; 125 S Ct 834; 160 L Ed 2d 842 (2005).

[11] *Id.* at 408.

canine sniff during a traffic stop must: (1) have a legal reason to stop the driver; and (2) not unreasonably prolong the duration of the traffic stop.[12]

We find that the traffic stop in this case did not violate the protections afforded by the Fourth Amendment. Ruge had a legal reason to stop Swanigan because of Swanigan's illegal lane use.[13] Additionally, Ruge did not unreasonably prolong the duration of the stop. The canine unit arrived approximately 12 to 15 minutes after the stop was initiated. This is similar to the timing of the traffic stop in *Williams*, which was found to be reasonable. In *Williams* the officer's initial questioning of the defendant and the vehicle's two other occupants lasted between five and eight minutes, and the canine unit arrived approximately three minutes after the initial questioning was completed.[14] Moreover, Ruge's decision to extend the stop and call for the canine unit was not unreasonable given the suspicious circumstances that arose.[15] Here, Ruge suspected that Swanigan might have been involved in drug activity based on his rental car agreement from out of the area, the fact that he was from out-of-town, and that he did not know where he came from or where he was going. Thus, Ruge was justified in extending the duration of the traffic stop to the extent that he did.[16]

Swanigan's contention that his Fourth Amendment rights were violated because Ruge lacked the reasonable suspicion necessary to call for the canine unit must fail. The relevant inquiry is not whether Ruge had a reasonable suspicion of criminal activity, but rather whether he unreasonably prolonged the traffic stop.[17] Accordingly, Swanigan is not entitled to relief.

Next, Swanigan asserts that the trial court erred when it permitted the jury to consider People's exhibit number two, an untested bag that allegedly contained powder cocaine. Swanigan alleges that the trial court lacked the requisite foundation to admit exhibit number two without expert testimony. In the alternative, he argues that under MRE 403, the evidence should have been excluded because its probative value was substantially outweighed by its prejudicial effect. We disagree. We review the trial court's ruling on "evidentiary decisions for an abuse of

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[12] *Id.*; *Williams*, 472 Mich at 318.

[13] See MCL 257.642(1).

[14] *Williams*, 472 Mich at 311.

[15] See *id.* at 315 ("[W]hen a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised.")

[16] *Id.*

[17] *Id.* at 318 (Where the stop is not unreasonable, "[i]t is unnecessary to consider whether [the officer] had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics . . .").

discretion"[18] and will not reverse a conviction because of a trial court's evidentiary ruling unless "it is more probable than not that the error was outcome determinative."[19]

Pursuant to a motion by defense counsel, the trial court instructed the jury not to consider what had been admitted as the People's exhibit numbers three and four, two untested bags that allegedly contained crack cocaine. Because the substance in exhibit number two appeared similar to a substance that was confirmed as cocaine by chemical testing, the trial court allowed the jury to consider the evidence. We find that the prosecution established the proper foundation for admitting exhibit number two when it presented testimony from a forensic scientist employed by the Michigan State Police confirming that the substance in exhibit number two appeared similar to the substance that was tested and confirmed to be powder cocaine.[20]

Additionally, under MRE 403, the probative value of the untested substance was not substantially outweighed by the danger of unfair prejudice, as the amount and packaging of the substance in exhibit number two was relevant to Swanigan's intent to distribute the substance.[21] Thus, because the evidence was highly probative, there was less danger that it would be given undue weight by the jury.[22]

Furthermore, even if the trial court erred by permitting the jury to consider exhibit number two, Swanigan is not entitled to relief because he cannot demonstrate prejudice.[23] The evidence presented against Swanigan was sufficient to find his intent to distribute the drugs even without the admission of exhibit number two. A defendant's intent to deliver a controlled substance may be inferred from the amount of the controlled substance and the manner in which it is packaged.[24] Here, the prosecution presented testimony from a police officer who testified that the "chunks" of powder cocaine in the properly admitted exhibit of tested cocaine were meant to be broken up for later distribution. A police officer may, based on his experience in law enforcement, give his personal opinion regarding aspects of the drug trade.[25] Accordingly, even without the admission of exhibit number two, the evidence supported Swanigan's intent to

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[18] *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

[19] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[20] *People v Koehler*, 54 Mich App 624, 634; 221 NW2d 398 (1974); *People v Kirchoff*, 74 Mich App 641, 647; 254 NW2d 793 (1977).

[21] See *People v Ray*, 191 Mich App 706, 708-709; 479 NW2d 1 (1991) (the amount of the controlled substance is relevant to the defendant's intent to deliver the substance). See also *People v Williams*, 188 Mich App 54, 57; 469 NW2d 4 (1991) (a jury may infer that the substance found in untested packages is the same as a similar-looking substance that had been tested).

[22] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

[23] *Lukity*, 460 Mich at 495-496.

[24] *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

[25] *Ray*, 191 Mich App at 707-708.

distribute the cocaine.[26] Therefore, Swanigan was not prejudiced by exhibit number two, as its admission did not change the outcome of the case.[27] Thus, relief is not warranted.

Finally, Swanigan contends that his trial counsel was ineffective for failing to move for a mistrial or an instruction that prohibited the jury from considering how the untested substances in exhibits two, three and four were packaged as evidence of Swanigan's intent to deliver. We disagree. This issue is unpreserved, so "[this Court's] review is limited to errors apparent on the record."[28]

A defendant is denied the effective assistance of counsel if counsel's "performance fell below an objective standard of reasonableness . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial."[29] Because we determined that Swanigan was not prejudiced by the admission of the untested substance in exhibit two, his claim for ineffective assistance of counsel in that regard lacks merit.[30] Additionally, review of the record reveals that an appropriate instruction was given that the untested substances in exhibits three and four, which were suspected to be crack cocaine, were excluded from evidence. As such, because "jurors are presumed to follow their instructions,"[31] any further request for instruction by defense counsel would have been futile. Trial counsel is not ineffective for failing to raise a meritless argument.[32]

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

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[26] See *Fetterley*, 229 Mich App at 518.

[27] *Lukity*, 460 Mich at 495-496.

[28] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[29] *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

[30] *Id.*

[31] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[32] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).